

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 29, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 96-0532-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RALPH ANTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County:
MICHAEL J. MULROY, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

PER CURIAM. Ralph J. Anton appeals from a judgment of conviction entered on a jury verdict finding Anton guilty of three counts of sexually assaulting C.S., a child under thirteen years of age, contrary to

§ 948.02(1), STATS.¹ Anton argues that: (1) he received ineffective assistance of trial counsel; and (2) he is entitled to a new trial because the investigating officer was permitted to testify three times that C.S. and his brothers were truthful, a practice prohibited by *State v. Romero*, 147 Wis.2d 264, 277, 432 N.W.2d 899, 904 (1988). We conclude that although Anton disagrees with trial counsel's strategy, counsel was not unreasonable in adopting the strategy he chose and was therefore not ineffective. We further conclude that the testimony of the investigating officer did not run afoul of *Romero*. Therefore, we affirm the conviction.

ANALYSIS

Ineffective Assistance of Counsel

In order to prevail on an ineffective assistance of counsel claim, Anton has to show: (1) that his counsel's performance was deficient, and (2) that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We must scrutinize counsel's performance to determine whether "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. *See also State v. Ambuehl*, 145 Wis.2d 343, 351, 425 N.W.2d 649, 652 (Ct. App. 1988).

Anton's ineffective assistance of counsel claim is premised on the assumption that his trial counsel must have known this case would turn into a credibility contest between Anton and the child complaining witnesses. Therefore, Anton claims that trial counsel was irrational and ineffective for failing to arrange

¹ Anton was found not guilty of two further counts of sexually assaulting C.S.'s two older brothers, T.S. and B.S.

for corroborating testimony and character witnesses. Trial counsel, however, testified at the postconviction hearing that his strategy was to gain acquittal by focusing on internal inconsistencies in the statements made by the complaining witnesses.² That counsel's strategy was not irrational is shown by Anton's acquittal on two of the five charges he originally faced—acquittals achieved through counsel's "inconsistency" strategy.

Turning to specifics, Anton argues that trial counsel was ineffective for failing to call as witnesses his sister, Betty Anton, and his co-worker, Peter Allen. Anton argues that because the trial came down to a credibility contest between himself and C.S., Betty's corroborating evidence regarding aspects of Anton's home and of C.S.'s behavior were crucial. In addition, both Betty and Peter Allen would have testified to Anton's good character and reputation for truthfulness.

At the postconviction hearing, trial counsel testified that he did not call Betty for several reasons. First, he had never been made aware, by Betty or the defendant, that Betty could contradict contentions that Anton received the Disney Channel in his home or that the bedroom door was capable of being, and had in fact been, shut when C.S. was assaulted. Second, while he did know Betty could corroborate Anton's testimony that C.S. had once spontaneously removed his own pants and run away, counsel had no idea that the defendant would "volunteer" testimony about that incident on cross-examination. Counsel admitted that once Anton related this testimony, Betty's corroborating testimony became

² In his reply brief, Anton agrees that C.S.'s statements are "far from consistent."

“absolutely crucial.” However, Betty was not available after Anton’s unexpected testimony.

Regarding character testimony by either Betty or Peter Allen, counsel testified that, in his view, character evidence is less meaningful in sexual assault cases than other cases. Counsel stated that because sexual assault is a crime “hidden from everybody,” introducing character evidence can be counterproductive as it may lead jurors to reflect that the accused is secretive (hiding his true character from even those who knew him well.).

We conclude that counsel here did not fall below “an objective standard of reasonableness.” As stated previously, counsel’s strategy was not to bolster Anton’s testimony, but to discredit the children’s. Furthermore, on specific issues counsel was not ineffective for failing to call a witness to testify to knowledge that counsel had not been made aware the witness possessed. With regard to testimony that the Disney Channel was available in Anton’s home, Anton’s postconviction counsel conceded as much, stating at the postconviction hearing that the Disney Channel issue was a “new factor” which nobody saw as an issue going into the trial.

Regarding whether the bedroom door was shut during the assault, Anton did not establish at the postconviction hearing that he or Betty had made counsel aware of the door’s alleged inability to shut. Additionally, the circuit court found that Betty’s knowledge about the bedroom door was irrelevant for two reasons—because it was unclear that Anton had contradicted testimony about the door being shut as well as because even a partially shut door can be characterized as “closed” to the mind of a young child.

Regarding Betty's ability to corroborate Anton's testimony about C.S.'s spontaneous act of pulling down his own pants, counsel was not objectively unreasonable in failing to have a witness on hand to corroborate testimony that came as a surprise to counsel. Effective assistance of counsel is not tantamount to a requirement that counsel be prepared for every possible trial contingency that reveals itself to hindsight. Rather, we must evaluate counsel's conduct "from counsel's perspective at the time." *Ambuehl*, 145 Wis.2d at 351, 425 N.W.2d at 652 (quoting *Strickland*, 466 U.S. at 689). Counsel's perspective going into trial was that C.S.'s pant-pulling-down behavior would not come out at trial and would therefore not need corroboration. This was consistent with counsel's trial strategy to point out the internal inconsistencies in the children's statements rather than to make the trial into a credibility contest between Anton and the children.

Last, counsel was not ineffective for failing to elicit character evidence from Betty or Peter Allen. Counsel decided against character evidence because of the nature of the crime. Thus, counsel made a strategic choice, and informed "strategic choices ... are virtually unchallengeable." *Strickland*, 466 U.S. at 690.

Investigator's Testimony as to Truthfulness

In *State v. Haseltine*, 120 Wis.2d 92, 96, 352 N.W.2d 673, 676 (Ct. App. 1984), we stated: "No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." In the context of child sexual assault, our supreme court stated that where, as here, a credibility contest emerges between the child complaining witness and the defendant, it is erroneous to permit testimony (or closing argument) on the child's credibility or character for further truthfulness. The court

explained: “There is a significant possibility that the jurors, when faced with the determination of credibility, [will] simply defer[] to witnesses with experience in evaluating the truthfulness of victims of crime.” *State v. Romero*, 147 Wis.2d 264, 279, 432 N.W.2d 899, 905 (1988).

Relying on this precedent, Anton argues that the circuit court committed reversible error in permitting two references during trial to an investigator’s statement to Anton that C.S., T.S. and B.S. were “being truthful.” Anton also alleges that the trial court erred in permitting closing argument by the State that the investigator confronted Anton with the belief that the kids were telling the truth.

We reject Anton’s argument. *Haseltine* and *Romero* do not permit third-party testimony as to whether a witness seen by the jury is in fact credible. The rationale is to preserve for the jury issues of witness credibility. The testimony Anton complains of does not fall into this category, however. Where evidence is not offered on the issue of the child complaining witnesses’ credibility, but for another purpose, *Haseltine* and *Romero* are not implicated.

In *State v. Jensen*, 147 Wis.2d 240, 432 N.W.2d 913 (1988), a school guidance counselor was permitted to testify that he found the child complaining witnesses’ behavior to be consistent with the behavior of other child sexual assault victims. Our supreme court held that this was not tantamount to an expert opinion that the child was telling the truth. Rather, the opinion was permissible to explain the context of the child’s behavior and statements, as well as to rebut the suggestion that the child had fabricated the incident. *Id.* at 250, 255-56, 432 N.W.2d at 917-18, 920.

Similarly, in *State v. Smith*, 170 Wis.2d 701, 490 N.W.2d 40 (Ct. App. 1992), a detective was permitted to testify that he had continued an investigation because he did not believe the defendant was being truthful. We held that the testimony was permissible to explain the detective's continued investigation, noting that the purpose of the testimony was not to attest to the defendant's truthfulness. *Id.* at 718, 490 N.W.2d at 48.

Here, the references to the investigator's belief in the children's truthfulness were permitted to show that when the investigator had confronted Anton with a belief that the children were truthful, Anton failed to respond. This tended to undermine Anton's trial testimony that he had denied the accusations to the investigator at that time. Thus, rather than being introduced as evidence of C.S.'s credibility—prohibited by *Haseltine* and *Romero*—the testimony was permitted to attack Anton's credibility in light of his trial testimony.³

By the Court.—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

³ Anton argues that a failure to respond to the investigator's belief in the children's truthfulness does not necessarily negate prior and subsequent denials. While this is a true and logical statement, this objection goes to the weight rather than the admissibility of the investigator's testimony.

